

1-1-1968

Deciding Who Is Human;Note

John T. Noonan Jr.

Follow this and additional works at: http://scholarship.law.nd.edu/nd_naturallaw_forum



Part of the [Law Commons](#)

Recommended Citation

Noonan, John T. Jr., "Deciding Who Is Human;Note" (1968). *Natural Law Forum*. Paper 142.
http://scholarship.law.nd.edu/nd_naturallaw_forum/142

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Natural Law Forum by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

DECIDING WHO IS HUMAN

In an essay entitled "Abortion and the Catholic Church: A Summary History," I stated that "the fundamental question in the long history of thought on abortion is, How do you determine the humanity of a being?"¹ I suggested that "if one steps outside the specific categories used by the theologians, the answers they gave can be analyzed as a refusal to discriminate among human beings on the basis of their varying potentialities."² My statement and suggestion were made in an effort to formulate, in terms comprehensible to a contemporary reader, the heart of the historical debate on the morality of abortion. In "On Humanity and Abortion" John O'Connor takes these statements about the history of the question as my "argument" that abortion is morally wrong. I do believe that abortion is morally wrong and that my humanistic restatement of the theologians' answer may be convincing in showing why it is wrong, but I am glad of the opportunity afforded by Mr. O'Connor's critique to develop more formally, more antithetically, and perhaps more convincingly, propositions I originally put forward as an aid to historical understanding rather than as deliberate argument.

O'Connor's attack on the central part of my position is a forthright charge of illogic: I have introduced a fourth term in the syllogism underlying my view and have concluded from the proposition that "it is morally wrong to kill humans" that "it is morally wrong to kill potential humans." If O'Connor were correct in this analysis, I would indeed have "certain defects" in my discussion.

What the theologians maintained, however, and what I maintain in following them, is that everyone is human who is conceived by human beings; that human beings may not be discriminated by their varying potentialities. These propositions are a necessary step before the presentation of any argument about the morality of killing any class of beings. If these steps are not taken, one is left with arguments of the form O'Connor criticizes:

- a) All A's (humans) are B's (potential humans).
- b) All C's (Biafrans) are B's (potential humans).
- c) It is morally wrong to kill A's.
- d) It is morally wrong to kill C's.

Nigerians confronted by such logic will treat Biafrans like kangaroos and kill them.

The argument I made is that it is wrong to kill humans, however poor, weak, defenseless, and lacking in opportunity to develop their potential they may be. It is therefore morally wrong to kill Biafrans. Similarly, it is morally wrong to kill embryos.

Put another way, the argument is that all beings conceived of human flesh are weak, helpless and potential in respect to other such beings in at least

¹ John T. Noonan, Jr., *Abortion and the Catholic Church: A Summary History*, 12 NATURAL LAW FORUM 125 (1967).

² *Id.* at 126.

some aspect. It is easy but wrong for the more powerful to justify destroying the weaker by pointing to one of the differences in potential, whether the difference be indicated by race, religion, nationality, sex, social class, intelligence, or age. The differences are immaterial to a judgment on the morality of killing.

This argument is not, as O'Connor contends, constructed for the special purpose of showing that abortion is wrong. It is an argument showing why any person whose potentialities cannot be exercised as fully as his neighbor's may not morally be killed by the more developed one. It may be applied in the case of those who have temporarily lost the capacity to reason by intoxication or illness, in the case of those permanently ill, in the case of the senile and the dying, and in every case where some person or group stands out sufficiently in helplessness to prompt others to ask, Why not kill these different beings and spare ourselves the trouble of being responsible for them?

The only way this argument can be directly met is by maintaining that in determining who should live, human beings should be discriminated by their potential. O'Connor makes one very brief attempt to make this discrimination by asking, "Are acorns and full-grown trees potentially oaks in the same sense?" Of course, they are not. Nor are fetuses and full-grown humans potentially adults in the same sense. Oaks and adults have developed certain potentialities. My contention is that in the case of humans a difference in development of potential should not make a difference in liability to being killed. The many differences in realization of potential between embryo, child, young man, and octogenarian do not make a significant difference for the purposes of killing. O'Connor can succeed in his challenge only by showing that there is something about the difference in development which makes killing permissible at one age and not at another; and this showing he does not attempt.

If my argument is not met by defending the right to kill human beings on a discriminating basis, it may be attacked by criticizing the argument's premise, "Whoever is conceived of human beings is human." O'Connor does not make a frontal assault on this premise, although he does not seem willing to accept it. Why should it be accepted? I advanced three considerations in its behalf: the presence of characteristics in embryo and adult which were similar, an argument based on probabilities, and a critique of alternative premises. Let me review O'Connor's treatment of these reasons for my premise.

The chief common characteristics I touched on were two: the presence of the genetic code and the capacity for rational thought. O'Connor concedes that "mention of the genetic code" is "perfectly valid if taken as an attempt to make adult humans realize the great affinity between them and human fetuses." But the common characteristic of the genetic code indicates more than "great affinity." It is what is common to all babies born of human parents and common to fetuses conceived of human beings and is not common to babies born of animals or to the sexual elements of human origin. Thus, if the question is asked, "Do fetuses belong with nonhuman animals, with the sexual elements of the human body, or with babies?" the answer the genetic code points to is, "Fetuses are properly classified with babies."

The capacity for rational thought is present in a fetus in the sense that it is present in a newborn baby: given the development of sense organs and existence for a certain period of time, this being will be able to reason. Such a capacity does not exist in spermatozoa, ova, or animals. It does exist in adult humans, although they, by intoxication or illness, may be impeded from exercise of this capacity for substantial periods of time. Consequently, it is appropriate to treat all beings with this basic capacity as human. The objection may be made that not until about the eighth week after conception can electrical activity be detected in the fetal brain and not until the twelfth week is the brain structure complete, so that the actual physical functions providing the capacity to reason are not present from conception. It may be answered that there is present from conception the material which will develop into a brain, so that from conception the embryo functions with the capacities which in time will enable him to think. The argument is not that a two-week-old embryo or a two-day-old baby is actually reasoning; in each case what is used as a pointer to their humanity is their present possession of physical characteristics which will later allow them to reason.

My second consideration in favor of my premise was an appeal to probabilities. O'Connor finds fault with this approach, critically labelling it as "unusual." I had supposed that the appeal to probabilities was the most commonsensical of arguments, that to a greater or smaller degree all of us based our actions on probabilities, and that in morals, as in law, prudence and negligence were often measured by the account one had taken of the probabilities. If the chance were 300,000,000 to 1 that the movement in the bushes into which you shot was a man's, I doubt if many persons would hold you careless in shooting; but if the chances were 4 out of 5 that the movement was a human being's, few would acquit you of blame in shooting.

O'Connor asks, Would the argument be different if only one out of ten children conceived came to term? Of course this argument would be different. This argument is an appeal to probabilities that actually exist, not to any and all states of affairs which may be imagined.

O'Connor asks how the probabilities as they do exist show the humanity of the embryo. They do not show it in the sense of a demonstration in logic any more than the probabilities of the movement in the bush being a man demonstrate beyond all doubt that the being is a man. The appeal is a "buttressing" consideration, showing the plausibility of the standard adopted. The argument focuses on the decisional factor in any moral judgment and assumes that part of the business of a moralist is drawing lines. One evidence of the non-arbitrary character of the line drawn is the difference of probabilities on either side of it. If a spermatozoon is destroyed, one destroys a being which had a chance of far less than 1 in 300 million of developing into a reasoning being, possessed of the genetic code, a heart and other organs, and capable of pain. If a fetus is destroyed, one destroys a being already possessed of the genetic code, organs, and sensitivity to pain, and one which had an 80% chance of developing further into a baby outside the womb who, in time, would reason.

My third consideration for the premise was the inadequacy of other criteria

of humanity. The criteria I looked at were those currently in use by persons favoring abortion. O'Connor thinks I easily showed their inadequacy. He is led by his suspicion of the ease of the victory to ask if the right question has been asked. To his challenge I respond that the effort to provide criteria is one in fact being carried on by persons trying to show that there is a significant difference between the fetus and the baby outside the womb. If their efforts are unsuccessful, the theologians' criterion is left in possession: Whoever is conceived of human beings is human.

O'Connor has, however, a second string to his bow, if he gives up attack on the central position. It is that my answer depends on an "objectivist metaphysics." It is not, however, clear what O'Connor means by this term. It would seem to me that a "subjectivist metaphysics," such as Kant's, could as easily lead to the position I have taken. To apply Kantian principles requires a determination of what other beings are like myself and a search for criteria identical with the search I have undertaken.

Yet, O'Connor persists, you take "humanity" as an "attribute," whereas many philosophers do not believe in attributes. There are persons, I would say, who have given up the rational discussion of morality, because of a disbelief in the similarity of human beings. I am familiar, however, with no one who reasons or even talks about moral questions who does not suppose that there is a sense in which he and others of whom he speaks are "human." It will be recalled, for example, that even Jean Paul Sartre wrote "Existentialism Is a Humanism," and in more recent years has taken to filling out the bones of existentialist morality with a number of modified Marxist propositions which presuppose a humanity in the process of developing potential. I do not insist on the word "attribute," but I say that as long as moral discourse is regarded as meaningful, the argument will refer to "man" and tacitly suppose that a man is recognizable.

There is a final attack, however, by O'Connor on the whole argumentative enterprise I have undertaken. I have proceeded, he maintains, on the mistaken notion that criteria for humanity are to be "discovered"; in fact, they are to be "decided."

I reject O'Connor's classification of my procedure, which I described as answering the question, "How do you determine the humanity of a being?" After all, one of the principal insights of modern jurisprudence has been that judges do not "discover" the law. I have always supposed that there was an analogous insight to be followed in moral discourse. In terms of the philosophical system with which I am most familiar, and eclectically adopt, the reason directs the will, but the will chooses which finite good to prefer. This descriptive hypothesis about human action suggests the constant interplay between desires and concepts. In the adoption of any moral criterion, as in its application, volition is involved. I agree with O'Connor's use of "decision" if its use implies that no moral position is reached independently of the basic tendencies of the human being taking the position: "as a man is, so his end appears to him."

O'Connor's emphasis on the term "deciding" may, however, point to a real

conflict between us. If the function of choosing is exclusively regarded, the volitional is improperly considered at the expense of the rational. O'Connor appears to admit as much when he says "there are good and bad reasons for deciding the way we do." He adds that he is interested in determining "the scope of the moral principle that the taking of life is wrong." But his actual attempt to develop criteria reveals a weighting of volitional elements that reduces reasoned decision to arbitrary decision.

What O'Connor does is to reinstate as a criterion what I had characterized and criticized as the test of "feeling." It is, he maintains, the moral sensibility of men which will determine when abortion is justified. But if I understand this eighteenth-century term correctly, sensibility is properly a subspecies of the wider category I had employed, "the sentiment of adults." Just as we feel differently about the death of an embryo or the death of an octogenarian or the death of one hopelessly insane or the death of a Hitler than we do about the death of a twelve-year-old boy, so we feel differently about the person who produces the death. Some people may be inclined to hold less morally reprehensible the killer of the insane, the killer of a Hitler, the killer of the embryo, perhaps even the killer of the octogenarian. O'Connor argues that this "psychological difference" has "a moral dimension," and so may be a guide to the morality of abortion.

His contention seems to me both arbitrary and dangerous. It is arbitrary because it takes as a guide the postulated feelings of some unidentified persons. I do not know why O'Connor's speculation about their feelings should give him guidance. He himself seems unaware of the range of feelings which human beings even in America may possess, as he declares, "no one in our society at least feels that killing a tree is anything like killing a human being." After all, children learn the verse, "Woodman, spare that tree." At the International Conference on Abortion, the distinguished dean of an American law school assured me that he was more distressed by the killing of a venerable old oak than he was by the killing of an embryo.

O'Connor's contention is dangerous as well, partly because of his blindness to the variety of human feelings. If feelings are the key, many slaveowners have felt it perfectly moral to abuse and even kill their slaves, many Communist cadres have seen nothing reprehensible in killing landlords, many Nazis felt no twinge of guilt in exterminating Jews and Poles whom they believed not to belong to the human species, there are blacks today who proclaim they would be doing an act of justice in eliminating the whites of their country. If O'Connor's reply is, "I am speaking of enlightened moral feelings," then "enlightened" requires elucidation, and we turn from feelings to reasons.

As practiced by O'Connor, the process of deciding who is human becomes an appeal to the sensibility of some master group. If, as he has observed on my earlier essay, my arguments against deciding by feeling seem to him "very weak," it is because he has so little appreciation of the lessons of historical experience. In moral matters, such experience is a great guide. We are confronted with a large number of examples from the past to the present where a difference in nationality or sex or age has been seized on by a powerful class to eliminate those troubling it. The trick is an ancient but necessary one: define the class

out of humanity, then you may feel free in oppressing or exterminating it, your moral sensibilities will not in the least be injured. To urge the moral sensibility of an elite as a good way of deciding whom to kill is to provide a rationalization for all of the examples of group oppression and destruction which history affords and contemporary events continue to provide.³

O'Connor attempts to buttress the argument on moral feeling by considerations on the visibility and activity of the fetus. "A two-month-old fetus does not look or behave like a child or adult and therefore would probably not be a possible object of parental love." In this buttressing O'Connor seems to have slipped into "objectivist metaphysics," looking at features of the embryo to determine why a parent might or might not love him. The objective data in fact available might induce O'Connor to change his mind:

Because the fetus is benignly protected, warmed, and nourished within the womb, it was long thought that the unborn must have the nature of a plant, static in habit, and growing only in size. Recently, through modern techniques of diagnosing and treating the unborn baby, we have discovered that little could be further from the truth. The balloon of fluid is at first large in proportion to the tiny body, and the unborn of three months is buoyant and active. His movements to and fro, round and around, up and down, have the wonderfully relaxed grace which we see in films of life under water. . . .

The unborn's structure at this early stage is highly liquid, and although his organs have developed, he does not have the same relative bodily proportions that a newborn baby has. The head, housing the miraculous brain, is quite large in proportion to the remainder of the body, and the limbs are still relatively small. Within his watery world, however (where we have been able to observe him in his natural state through a sort of closed-circuit x-ray television set), he is quite beautiful, perfect in his fashion, active and graceful. He is neither a quiescent vegetable nor a witless tadpole, as some have conceived him to be in the past, . . .⁴

There are ways in which the behavior of this being does not equal adult behavior, just as there are many ways in which a two-year-old's behavior is unlike adult behavior. Is the strangeness of these ways to be the guide to killing?

As far as the looks of the embryo are concerned, I can only remind O'Connor that all kinds of people judge others by their strange color and appearance and conclude from the funny different look of the others that it is right to mistreat them or kill them because they could not be possible objects of their love. Does not such experience suggest that one should not determine humanity by looking?

Let me try a counterargument based on the sense of touch. No later than

³ A famous passage of Montesquieu reads:

Ceux dont il s'agit sont noirs depuis les pieds jusqu'à la tête; et ils ont le nez si écrasé qu'il est presque impossible de les plaindre.

On ne peut se mettre dans l'esprit que Dieu qui est un être très-sage, ait mis une âme, surtout une âme bonne, dans un corps tout noir.

Il est si naturel de penser que c'est la couleur qui constitue l'essence de l'humanité, que les peuples d'Asie, qui font des eunuques, privent toujours les noirs du rapport qu'ils ont avec nous d'une façon plus marquée. MONTESQUIEU, *DE L'ESPRIT DES LOIS*, in *OEUVRES COMPLETES* bk. 15, ch. 5 (Paris, 1843).

⁴ H. M. I. LILEY, *MODERN MOTHERHOOD* 26-27 (1965).

the fourth week after conception the embryo's heart is pumping; by the sixth week all internal organs will be present.⁵ This heart, these organs, are not the heart and organs of animals nor are they possessed by spermatozoa and ova; they are unfinished forms of the adult heart and organs. By the seventh week tickling of the mouth and nose with a hair will cause the embryo to respond. Is not the sensation of pain also similar to an adult's sensation?

Methods have now been perfected to provide blood transfusions to the baby in the womb by perforating the membrane connecting the baby to the mother. It is observable that the baby responds to this perforation.⁶ Suppose the baby were perforated for the sake of the pleasure of the person doing it. Suppose the perceptible pain inflicted on the baby were the source of a good deal of satisfaction to some adult. Would O'Connor justify such infliction of pain because it was inflicted on a being who did not look "like a child or an adult"? If he would not justify such actions, why does he try to justify the more painful and final act of killing the baby? The embryo, too, if he could speak, might say like Shylock, "If you prick us, do we not bleed?"

JOHN T. NOONAN, JR.

⁵ J. W. C. Johnson, *Cardio-Respiratory Systems*, in *INTRA-UTERINE DEVELOPMENT* 176 (ed. A. C. Barnes, Lea and Febiger, 1968).

⁶ LILEY, *op. cit. supra* note 4 at 50-51.